Petition

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81-562

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

SOSO LIANG LO,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

SOSO LIANG LO, Pro Se
242 East 38 Street
New York, New York 10016
(212) 353-6658
Petitioner

August 14, 1981

QUESTIONS PRESENTED

1. Whether Petitioner has a right of intervention nonetheless in an EEOC suit against a non-governmental employer for equitable and injunctive relief against discriminatory employment practices?

2. Whether Petitioner's application for intervention, filed 6 months prior to the date set for trial for the original action was timely filed?

3. Whether EEOC may, with impunity conceal, mislead or misrepresent to lay persons the procedural and substantive forms of relief available to them?

4. Whether EEOC is entitled to place class rights above individual rights by actively preventing an individual grievant from intervening in an EEOC class enforcement suit?

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This case presents important issues of federal employment discrimination law not heretofore decided by this Court.

This case also presents issues about which different Courts of Appeals, (the 2nd and 4th), have reached different conclusions and presents issues for which the U.S. Second Circuit reached conclusions which are in apparent conflict with applicable decisions of the Supreme Court of the United States.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

OF THE SECOND CIRCUIT.

Petitioner, Soso Liang Lo, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 18, 1981.

PROCEEDINGS BELOW

On March 18, 1981, the Court of Appeals for the Second Circuit entered a judgment affirming the decision of U.S. District Court for the Southern District of New York, denying Petitioner's motion to intervene in a Title VII suit brought by the Equal Employment Opportunity Commission (EEOC) against her former employer, Pan American World Airways, Inc., 78 Civ. 4608 (S.D.N.Y.) Petitioner's motion for intervention was brought on June 12, 1980 and the District Court denied sua sponte her motion on October 10, 1980. Petitioner moved to stay the trial on November 5, 1980 and the District Court denied sua sponte her motion on November 12, 1980 and trial commenced on the same day. The EEOC's suit was settled with the entry of a consent decree on December 4, 1980. The Second Circuit also denied Petitioner's application to share in the benefits of the settlement.

JURISDICTION

This Court has jurisdiction to review this case pursuant to 28 U.S.C. 2101 (c).

CONSTITUTIONAL AMENDMENTS AND STATUTES

United States Constitution, Article 3, Section 2: Case and Controversy; 5th and 14th Amendment: Equal Protection and Due Process Clauses; 1st Amendment. Federal Laws: 42 U.S.C. 2000e et seq.; 42 USC 2000e-5(f)(1), Title VII of 1866, 1871, 1964 as amended; 42 USC 1981, Equal Rights Under the Law; 42 USC 1983, Civil Action for Deprivation of Rights; 42 USC 1985, Conspiracy to Interfere with Civil Rights. Federal Rules of Civil Procedure: FRCP Rule 19, Indispensable and necessary parties; Rule 21, Adding a party at any stage of the action; Rule 23, Class Actions; Rule 24, Intervention. Congressional Legislation: Congressman Augustus F. Hawkins, Chairman, Subcommittee on Equal Opportunities, Equal Employment Oversight Report, 1977, 95th Congress;

Senator Orrin G. Hatch, Chairman, Subcommittee on the Constitution, Senate Joint Resolution 200, 96th Congress, 2nd Session, S.J. 41, 97th Congress, 1st Session. Federal Regulation of Employment Service, "Job Discrimination, Enforcement of Title VII" by David P. Van Knapp, FRES sections 3:13 at 37; 3:106 at 150-151; 3:107 at 152-153; 3:126-3:129 at 183-189; 3:255 at 358-359.

"Civil Rights in a Nutshell", Norman Vieira, Professor at Law, University of Idaho, on Congressional Enforcement, pg. 221: "Private party has a right to intervene."

"Employment Discrimination Law", Barbara Lindemann Schlei and Paul Grossman, pg. 1051: "If the EEOC sues first, the charging party may intervene as a matter of right."

"Fair Employment Litigation Manual", Susan R. Agid, George Cooper, Harriet Rabb, Howard J. Rubin, Columbia Law School, pgs. 10-13, 32-33, 43, 89, 90: "The only exception to the charging party's right-to-sue letter arises when the EEOC has actually taken the step of filing a civil action in a federal district court... charging party may privately intervene in the EEOC action as a matter of right..." (42 U.S.C. 2000e-5(f)(1)).

STATEMENT OF THE CASE

Petitioner brought her original motion either for intervention and/or for transfer of her Eastern District action and/or for consolidation with EEOC's action. The legal and factual issues of her claim are substantially similar to those in the EEOC's suit.

District Court Judge Carter, in denying Petitioner's motion, treated it merely as a motion to intervene. He did not discuss, in his opinion Petitioner's alternative request. His decision is accordingly incomplete because it did not address the question of consolidation.

Judge Carter dealt with Petitioner's motion first as one for intervention of <u>right</u> and then as one, for permissive intervention.

As to intervention as of right, he ruled that EEOC was precluded by the right-to-sue letter from representing Petitioner's claim. However, absolutely nothing in section 706 (f)(1) of Title VII supports this proposition. In fact, Petitioner never requested

any notice of right-to-sue letter from EEOC and nothing in the record appears as proof that EEOC was precluded from representing Petitioner's claim or that Petitioner should not be treated as a named class member. Petitioner's claim, insofar as it charges discrimination on grounds of race and national origin, falls squarely within the ambit of the EEOC's complaint (as amended by stipulation).[1]

1. Merely because Petitioner's complaint also alleges sex discrimination is no basis to deny her the right to intervene.

2. EEOC's original complaint also included sex discrimination, (as did Petitioner's original EEOC complaint.) Moreover, EEOC refused to amend Petitioner's complaint and drop sex discrimination even though the sex discrimination claim should have been asserted in a separate EEOC charge (it was related to maternity benefits in connection with Petitioner's young child). EEOC itself combined the allegations of sex for mere convenience at the time. EEOC should have amended Petitioner's complaint when it amended its own original complaint to drop sex discrimination.

3. Title VII is remedial in its purpose and should be interpreted liberally by the courts: it should not be narrowly interpreted so as to cut off Petitioner's rights.

Regarding permissive intervention, Judge Carter based his decision denying permission, on the assumption that Petitioner's Eastern District case would permit full determination of her rights. That assumption is error since there appears to be procedural defects in Petitioner's Eastern District case in which Petitioner is also appearing pro se. While EEOC can bring a pattern and practice enforcement action (a Title VII suit), an individual is barred from doing so, an individual may only intervene in EEOC's action. (See FRES) It should be noted that a similar case had already been filed by an individual named Stephen Chooey, individually and on behalf of all others similarly situated on November 22, 1974 in California. The fact that Petitioner's "continuing violation" charge of discrimination abrogated by expiration of the 90 day right-to-sue period could bar Petitioner from suing in the Eastern District on that claim.

On the other hand, both of these barred aspects of Petitioner's claim were encompassed within the EEOC's complaint in its suit.

EEOC, in its joint brief, appears to concede sub silention that both the above grounds for denial of intervention were error. EEOC cited no authorities on this issue. EEOC relied only on an additional ground, the finding of timeliness. It is not at all clear that Judge Carter could have denied intervention on non-timeliness alone. He only mentioned this factor in conjunction with two other erroneous assumptions.

Petitioner submits that she should not have been denied the right to intervene and/or transfer and/or consolidate on the grounds of timeliness. Petitioner should have been permitted the rights of a party, at least to the extent of objecting to certain of the terms of the settlement that were proposed and accepted six months after her motion to intervene was brought. A six months lapse before trial is hardly untimely.

On or about June 12, 1980, shortly after defendant defaulted in Petitioner's Eastern District action, she learned that EEOC had a similar suit in

the Southern District and defendant's counsel, being confused, had defaulted in Petitioner's pro se suit because EEOC had informed said counsel that the Court lacked jurisdiction to entertain Petitioner's suit. Petitioner moved expeditiously to intervene in EEOC's suit against the same defendant. Judge Carter denied Petitioner's motion to intervene after total silence for 5 months, then on October 10, 1980 Petitioner was informed by the Court that it had acted sua sponte in this matter. There was no hearing, no oral argument, no findings of fact, no meeting, no conference of any nature hence there was no transcript regarding Petitioner's efforts to intervene. It should be emphasized that only EEOC opposed Petitioner's application for intervention. Since EEOC was plaintiff in the suit, defendant Pan Am and its unions did not move the Court in any aspects in connection with her application to intervene in EEOC's suit against them. (See docket sheet entries.) EEOC's reaching out to oppose Petitioner's application for intervention is aggressively misplaced. It is also a denial of due process and equal protection of law.

Judge Carter viewed Petitioner's efforts to intervene as an attempt to cure circuitously the defect caused by the languishing of the 90 day right-to-sue letter. In fact, Petitioner never requested said right-to-sue letter. Why should Petitioner be barred from claiming a right that any other aggrieved employee might have been entitled to? Why should Petitioner be in a worse position to seek equal protection of the laws under the umbrella of the EEOC's suit merely because EEOC happened to issue a right-to-sue letter and the 90 day period expired? In fact, EEOC could have easily tolled the running of the 90 day period because it issued the right-to-sue letter in error before the required 180 days, without ever obtaining or receiving the required request from Petitioner and because EEOC had actually taken the step of filing a civil action in a federal district court already on behalf of aggrieved employees. When Petitioner's complaint was pending before the EEOC, she was a member of the class of aggrieved employees on whose behalf EEOC was acting. EEOC sued first <u>before</u> it issued a right-to-sue letter to Petitioner. Accordingly, Petitioner

is entitled to intervene as a matter of right. EEOC never issued a determination of Petitioner's case. EEOC wrongly informed Petitioner as to the start of the ninety day period of limitations was "patently misleading". The Courts have ruled that "we will not visit the effects of EEOC's erroneous practice on (the complainant) who was misled by terminating (his) right to judicial examination of (his) employer's conduct." Complainants, it has been said, are "entitled to rely on...seemingly authoritative statements by the agency presumed to know the most about these matters." Petitioner was similarly "patently misled" by EEOC. That agency, EEOC, knew but never told Petitioner that it was investigating the complaints of other Pan Am employees.

The errors of EEOC have cost Petitioner irreparable injury. EEOC alleged that it attempted to conciliate but a copy of said letter was never mailed to me. EEOC alleged that it had attempted conciliation with Carmen McCulloch, as Director of EEO Administration for Pan Am by certified letter dated November 7, 1978. However, in a letter dated

February 21, 1980 to EEOC, counsel for Pan Am stated that his wife, "Carmen McCulloch is not a managing agent, director or officer of the defendant Pan Am". In any event, Petitioner did not know about the conciliation, nor EEOC's suit or her rights under it.[2] It has been well said that for a waiver to be valid there must be "an intentional relinguishment or abandonment of a known right or privilege." Clearly, an investigation brought by a governmental agency with all the resources of the federal government is likely to have a much happier result for the Petitioner than her own unaided actions. In short, Petitioner was deprived of her Fifth Amendment rights of due process and the equal protection laws and should now be allowed to be a member of the class of "aggrieved employees" and be permitted to share in the benefits of the EEOC's Consent Decree settlement.

2. "Mindful of the remedial and humanitarian underpinnings of Title VII...courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act." (fn. omitted) Sanchez v. Standard Brands, 431 F.2d 455 (1970) at 460-61 (5th Circuit)

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS WRONGLY HELD THAT PETITIONER HAS NO STATUTORY RIGHT UNDER TITLE VII TO INTERVENE IN A SUIT AGAINST A NON-GOVERNMENTAL EMPLOYER. THE ISSUE HAS NOT BEEN DECIDED BY THIS COURT IN 42 U.S.C. 2000e-5 (f)(1) 1976.

Petitioner moved to intervene in EEOC's action on the ground that she has a claim against Pan Am similar to those of the class members on whose behalf the EEOC instituted its suit. Petitioner's cause of action and EEOC's cause of action are substantially the same and there exist common questions of law and fact. Petitioner is a member of a class on whose behalf the original action is brought; her intervention will not unduly delay or prejudice the further adjudication of the rights of the original parties. The EEOC's suit has since been settled with the entry of a consent decree on December 4, 1980. It has been said that the use in Title VII of the language "a person claiming to be aggrieved" (emphasis added) shows a Congressional intention to define standing as broadly as is permitted

by the Constitution. In the absence of contrary authority, Petitioner should be entitled to intervene in a suit against a non-governmental employer, in this instant case, her former employer is Pan Am. Petitioner was terminated after ten years of service.

2. THE INTERPRETATION OF F.R.C.P. Rule 24(a) HEREIN CONFLICTS WITH COMMON LAW PRINCIPLES AND WITH PREVIOUS DECISIONS OF THIS COURT.

Section 706(f)(1) of Title VII provides an unconditional right of intervention to an aggrieved party within the meaning of the statute. Petitioner has also a constitutional right to intervene. "All citizens possess the right to petition the government for redress of their grievances." It is obvious that the legal interests of Petitioner and EEOC are so similar that they can not be separated. It is the duty of EEOC to see that the legislative intent is upheld for all persons. The Supreme Court held that the adjudication of the issue without the presence of all aggrieved employees would be prejudicial to a party not named.

In light of the fact that EEOC's enforcement suit did not specify a particular, well-defined class pursuant to FRCP 23, Petitioner falls under the purview of Title VII which require EEOC to represent all aggrieved employees. It is clear that Petitioner, being a member of the class of aggrieved employees, should be permitted to intervene. This is due to the fact that full relief could not be afforded to her without the presence of all aggrieved employees, since any relief granted to her will be similar to the legal interest of any and all aggrieved employees. Allowing Petitioner to intervene will avoid further litigation and preserve judicial economy.

3. PERMISSIVE INTERVENTION UNDER FRCP 24(b) WAS IMPROPERLY DENIED ON GROUNDS OF UNTIMELINESS; THE RESOLUTION WILL ELIMINATE INCONSISTENCIES BETWEEN COURTS.

Rule 24(b) of the Federal Rules of Civil Procedure authorizes permissive intervention when

"an applicant's claim...and the main action have a question of law or fact in common." This provision should be given a "liberal construction." 7A Wright & Miller, Federal Practice and Procedure, 1924 at 473. The pleadings filed by Petitioner makes it clear that she is a member of the purported class in the main action and that inter alia, has a question of law in common with it. As in the case of the named class members on whose behalf EEOC brought this suit, Petitioner also submitted her case to Wallace Price, Pan Am's then EEO Director who acknowledged receipt of her papers. Intervention in this action will afford this Court a more complete picture of the scope and impact of the challenged policy and practices of the defendant and will help sharpen, focus, and preserve the constitutional and statutory issue. Intervention will not unduly delay or prejudice the further adjudication of the rights of the original parties, since Petitioner raises issues substantially similar to those already presented and since the application is made at an early stage of the litigation. (6 months prior to trial.)

Petitioner has the right to intervene in this action pursuant to Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure. Further, denial of intervention would defeat an essential purpose of Rule 24, which is to conserve judicial resources by avoiding the multiplicity of lawsuits which would inevitably result if intervention is not granted. Accordingly, Petitioner prays for the right of intervention.

CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari should be issued.

Respectfully submitted,

SOSO LIANG LO, Pro Se
242 East 38 Street
New York, New York 10016
(212) 353-6658

Petitioner

Dated: August 14, 1981

APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. PAN AMERICAN WORLD AIRWAYS, INC. 78 CIV. 4608 (RLC)

ENDORSEMENT

Soso Liang Lo moves to intervene in this action on the ground that she has a claim against the defendant similar to those of the class members on whose behalf the Equal Employment Opportunity Commission (EEOC) instituted this lawsuit. However, there is no statutory provision allowing Ms. Lo to intervene in the instant lawsuit. The EEOC has not determined that there is probable cause to believe her charges are true; rather at the request of counsel for Ms. Lo,the EEOC issued her a right to sue letter, after which she allowed the ninety day statutory perioed to lapse. Since the EEOC is precluded from representing her claim, she has no statutory basis for intervention under Rule 24(a), F.R.Civ.P. See Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-(f)(1)(Supp. II, 1972).

Ms. Lo's request for intervention under Rule 24(b) is also denied. She has a private Title VII action pending in the Eastern District of New York; her rights can be fully determined in that litigation. See 7A

Wright and Miller, Federal Practice and Procedure 1913. If her private lawsuit is jurisdictionally defective due to her allowing the ninety day period to lapse, that defect cannot be cured circuitously by intervention in EEOC's lawsuit after she has already elected to bring her claim individually. In addition her motion in untimely, see FMC Corp. v. Keizer Equipment Co., 433 F2d 654 (6th Cir. 1970), coming shortly before the case will go to trial and representing issues of fact, such as sex discrimination, not raised by the EEOC in this proceeding.

The motion to intervene is denied.

IT IS SO ORDERED.

Dated: New York, New York
October 10, 1980

ROBERT L. CARTER
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of March 1981, one thousand nine hundred and eighty-one. Present: Honorable J. Edward Lumbard, Honorable Jon O. Newman, Circuit Judges, Honorable Henry F. Werker, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

Soso Liang Lo, Appellant-Applicant in Intervention, Equal Employment Opportunity Commission, Appellee-Plaintiff, versus Pan American World Airways, Inc., et al., Defendants. Appeal Docket no. 80-6198.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant pro se and submitted by appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

Soso Lo appeals from an order entered October 10, 1980, denying her motion to intervene in a Title VII suit brought by the Equal Employment Opportunity Commission (EEOC) against her former employer Pan American World Airways, Inc., 78 Civ. 1608 (S.D.N.Y.). On November 12, 1980, this Court denied her motion for a stay of that trial. The EEOC's suit has since been settled with the entry of a consent decree on December 4, 1980.

Appellant has no statutory right under Title VII to intervene in a suit against a non-governmental employer, 42 U.S.C. 2000e-5(f)(1) (1976), and Fed. R. Civ. P. 24(a) accords her no right of intervention, since the EEOC's suit cannot preclude the presentation of her individual claim, which she has in fact brought in a Title VII suit in the Eastern District of New York.

Permissive intervention under Fed. R. Civ. P. 24(b) was properly denied on grounds of untimeliness. The EEOC's suit was filed September 28, 1978. Lo sought intervention on June 12, 1980, after discovery had closed. Moreover, her individual suit can fully vindicate whatever legally cognizable claims she may have, and her claim raises issues of gender discrimination, which were dropped from the EEOC's suit in July 1979, leaving only claims of discrimination on the basis of race and national origin.

J. Edward Lumbard,

Jon O. Newman, Circuit Judges,

Henry F. Werker, District Judge

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D.C. 20543

June 2, 1981

Ms. Soso Liang Lo
242 East 38th Street
Apartment 5F
New York, New York 10016

RE: Soso Liang Lo v.
Equal Employment Opportunity
Commission, et al.
A-988

Dear Ms. Lo:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Marshall who, on June 2, 1981, signed an order extending your time to and including August 15, 1981.

A copy of the Justice's order is enclosed.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By Robert W. Kuhn,

Assistant Clerk

encl.

cc (letter only): Honorable Wade H. McCree, Jr.

A. Daniel Fusaro, Esq., Clerk, U. S. Court of Appeals for the Second Circuit. (Your No. 80-6198).